BAHARUM JUSOH & ORS A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
KN SEGARA JCA
BALIA YUSOF WAHI JCA
LIM YEE LAN JCA
[CRIMINAL APPEALS NO: C-05-112-2010,
C-05-113-2010 & C-05-114-2010] C
10 OCTOBER 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 18,054 grams cannabis - Common intention - Failure by trial judge to address issue of common intention - Whether constituted misdirection - Whether appellate intervention warranted - Penal Code, s. 34* D

CRIMINAL PROCEDURE: *Sentencing - Appeals - Appeal against conviction and sentence for drug trafficking - Common intention - Failure by trial judge to address issue of common intention - Whether constituted misdirection - Whether appellate intervention warranted - Penal Code, s. 34* E

The appellants were charged together for the offence of trafficking in 18,054 grams of cannabis. At the end of the case, the learned trial judge made a positive finding of fact that the appellants were in possession of the drugs and thus relied on s. 2 of the Dangerous Drugs Act 1952 to rule that the appellants were transporting and delivering the drugs to the agent provocateur. The appellants were thus found guilty of the offence of trafficking, convicted and sentenced to the mandatory death sentence. Hence, the appelants appealed on the ground that the learned trial judge failed to address his mind on the issue of common intention between the appellants. F G H

Held (allowing appeals; substituting conviction and sentence for trafficking with conviction for possession)
Per Balia Yusof Wahi JCA delivering the judgment of the court: I

(1) The learned trial judge had not dealt at all with s. 34 of the Penal Code in respect of common intention. There was no finding made by the learned trial judge as to what constituted

A the common intention to traffic in dangerous drugs between the appellants. This failure was a misdirection that rendered the appellants' conviction for the offence of trafficking to be wholly unsafe and merited interference. Nevertheless, there was ample evidence for the offence of possession as rightly
B found by the trial judge. (para 12)

[Sentencing the first and second appellants to 19 years' imprisonment and ten strokes of the rotan; and the third appellant to 20 years' imprisonment and ten strokes of the rotan].

C ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu-perayu telah dituduh bersama bagi kesalahan pengedaran 18,054 gram kanabis. Di akhir kes, yang arif hakim perbicaraan membuat penemuan fakta positif bahawa kesemua perayu
D mempunyai milikan dadah tersebut dan dengan itu bergantung pada s. 2 Akta Dadah Berbahaya 1952 untuk memutuskan bahawa perayu-perayu mengangkut dan menghantar dadah kepada agen provokasi. Perayu-perayu oleh itu didapati bersalah bagi kesalahan pengedaran, disabit dan dihukum mati. Oleh itu, perayu-perayu
E merayu ke mahkamah ini atas alasan bahawa yang arif hakim perbicaraan telah gagal mengarahkan mindanya kepada isu niat bersama di antara perayu-perayu.

F **Diputuskan (membenarkan rayuan; menggantikan sabitan dan hukuman bagi pengedaran dengan sabitan bagi milikan) Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:**

G **(1)** Yang arif hakim perbicaraan tidak menyentuh s. 34 Kanun Keseksaan sama sekali yang berkaitan dengan niat bersama. Tiada dapatan yang dibuat oleh yang arif hakim perbicaraan tentang apa yang membentuk niat bersama untuk mengedar dadah berbahaya di antara perayu-perayu. Kegagalan ini adalah satu salah arahan yang menyebabkan sabitan terhadap perayu-
H perayu bagi kesalahan pengedaran tidak selamat dan mewajarkan campur tangan. Walau bagaimanapun, terdapat keterangan yang lebih daripada mencukupi bagi kesalahan milikan seperti didapati oleh hakim perbicaraan.

I *[Menghukum perayu-perayu pertama dan kedua kepada 19 tahun penjara dan sepuluh sebatan rotan; dan perayu ketiga kepada 20 tahun penjara dan sepuluh sebatan rotan].*

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Dangerous Drugs Act 1952, ss. 2, 6, 39A(2)
Penal Code, s. 34

For the 1st appellant – KC Hue; M/s K C Hue
For the 2nd appellant - Richard Bong; M/s Bong & Co
For the 3rd appellant - Zamani Ibrahim; M/s Zamani Ibrahim
For the respondent - Kwan Li Sa; DPP

Reported by S Barathi

JUDGMENT

Balia Yusof Wahi JCA:

[1] The three appellants were charged together for an offence of trafficking in 18,054g of cannabis. The charge against them reads as follows:

> Bahawa kamu bersama-sama pada 17 Julai 2007, jam lebih kurang 10.30 pagi, di KM 8, Jalan Lama Bentong-Lurah Bilut, dalam Daerah Bentong, di dalam Negeri Pahang Darul Makmur, didapati mengedar dadah berbahaya jenis 'Cannabis' seberat 16,054 gram, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] At the close of the prosecution's case the learned trial judge ruled that a *prima facie* case had been established and all the three appellants were ordered to enter their defence.

[3] The three appellants gave their evidence on oath without calling any other witnesses. At the close of the defence, all the three appellants were found guilty on the charge, convicted and sentenced to the mandatory death sentence.

[4] The three appellants filed separate appeals, hence these three separate appeals. We heard these three appeals together at the end of which we allowed all the three appeals and set aside

A the conviction and sentence for the offence of trafficking and substituted it with a conviction for the offence of possession under s. 6 and punishable under s. 39A(2) of the Dangerous Drugs Act 1952 (DDA). As regards to sentence, we sentenced the first and second appellants to 19 years of imprisonment and 10 strokes of
B the rotan while the third appellant we sentenced him to 20 years of imprisonment and 10 strokes of the rotan. The sentence of imprisonment is to be effective from the date of arrest.

[5] The facts of the case have been sufficiently narrated by the
C learned trial judge at pp. 15-18 of the appeal record which formed the basis of the prosecution's case against the three appellants. For brevity, we do not propose to repeat the same in this judgment.

D **[6]** In their defence, all the three appellants never denied that they were all in the van travelling together all the way from Kelantan to Bentong. However all three denied any knowledge as to the drugs found in the same. The third appellant also admitted having asked his son to rent the van at the behest of a friend named Abang Soh who had asked him to deliver the van to a
E person called Mail Cina. According to the third appellant, he asked the first and second appellants to come along with him to take turns to drive the van from Kelantan to Bentong. They denied meeting with SP9, the agent provocateur at the scene of the crime.
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[7] The learned trial judge had made a positive finding of fact that all the three appellants were in possession of the drugs found in the van. We found no reason to disturb that finding.

G **[8]** For the offence of trafficking, the learned trial judge relied on the definition under s. 2 of the DDA and found the three appellants were transporting and delivering the drugs to SP9. They were thus found guilty of the offence of trafficking without the necessity of invoking any of the presumptions under the DDA.

H **[9]** In the appeal before us, various grounds were advanced by the learned counsel of each of the appellants, attacking the trial judge's finding and highlighting the infirmities in the prosecution's case. We do not find merit in those grounds. However, we found favour in the submissions of Encik Zamani Ibrahim, counsel for the
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third appellant ie, in Appeal No. C-05-114-2010, on the failure of the learned trial judge to address his mind on the issue of common intention.

[10] The learned Deputy Public Prosecutor, Ms Kwan Li Sa has also magnanimously conceded that there was a failure on the part of the learned trial judge to address the issue of common intention between the appellants in his grounds of judgment. In turn, the learned Deputy Public Prosecutor has urged us to invoke the proviso to s. 60 of the Courts of Judicature Act 1964 to uphold the conviction and sentence against the three appellants.

[11] While we agree that this court is seised with the power to review and to re-evaluate all the evidence adduced, we do not think that this is a fit and proper case for us to act under the same and to accede to the learned deputy's suggestion. As a general rule, this court will in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally however, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the appellants on the available evidence on a proper direction. (*Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800).

[12] We find that in the instant appeals, the learned trial judge has not dealt at all with s. 34 of the Penal Code in respect of common intention. There was no finding made by the learned trial judge as to what constitutes the common intention to traffic in dangerous drugs between the three appellants. In our view, this failure is a misdirection and we find the conviction of the three appellants for the offence of trafficking to be wholly unsafe and merits our interference. However, as we have stated earlier, we are satisfied that there is ample evidence for the offence of possession which the learned trial judge had rightly found.

[13] Accordingly, we allow the appeals against the conviction and sentence for trafficking and substitute it with a conviction under s. 6 and punishable under s. 39A(2) of the DDA. The conviction and sentence imposed by the learned trial judge is set aside. As regards sentence, we sentenced the first and second appellants to 19 years imprisonment and 10 strokes of the rotan and the third appellant to 20 years imprisonment and 10 strokes of the rotan. Sentence of imprisonment to take effect from the date of arrest.